

NTSB Order No.
EM-150

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 30th day of November, 1988

PAUL A. YOST, Commandant, United States Coast Guard,

v.

ROBERT J. TOMBARI, Appellant.

Docket: ME-133

OPINION AND ORDER

On November 4, 1987, a Coast Guard administrative law judge sustained a charge of negligence against the appellant on finding proved a specification alleging, in effect, that his failure, while serving as Chief Engineer aboard the R/V ENDEAVOR on August 11, 1986, to ensure the observance of all appropriate safety precautions in connection with vessel's changeover from ship power to shore power had resulted in the death by electrocution of an assistant engineer. Based on that finding the law judge ordered the suspension of appellant's license for 12 months outright and for an additional 12 months on probation. The appellant has appealed the law judge's finding of negligence and order on sanction, and that appeal is currently pending before the Vice Commandant. The instant appeal challenges the Vice Commandant's denial, by decision (No. 2467) issued July 12, 1988, of appellant's request, originally submitted on December 16, 1988, for a temporary license during the pendency of his appeal on the merits of the law judge's order.¹ For the reasons discussed below, we conclude that the appeal should be granted and the denial of a temporary license reversed.²

The Vice Commandant's denial of the request for a temporary license is not predicated on a judgment that, given the circumstances of the charge of negligence upheld by the law judge,

¹A copy of the Vice Commandant's decision denying the request for a temporary document is attached.

²The Coast Guard has filed a reply brief opposing the appeal.

appellant's service as an engineer aboard a vessel during the pendency of his appeal would be incompatible with requirements for safety at sea or inconsistent with applicable laws. See 46 CFR §5.707(c). Rather, the decision is based exclusively on a conclusion that appellant's service in a licensed capacity while his appeal is being reviewed would contravene the regulatory standard for issuing a temporary license because of questions arising after the subject incident that the Vice Commandant believes bear on appellant's mental competency. Specifically, the Vice Commandant appears to doubt that appellant has sufficiently recovered from the severe depression his involvement in the death of his shipmate caused him. In our judgment, the Vice Commandant's views in this regard provide no basis for denying appellant a temporary license in this proceeding.

As a general matter, there are five grounds on which the Coast Guard may initiate action against a merchant mariner to suspend or revoke his seaman documents or licenses; namely, on charges of misconduct, negligence, incompetence, violations of law or regulation, or conviction for a dangerous drug law violation or use of or addiction to a dangerous drug. See 46 CFR §5.23. Were one or more of these charges has been proved in a proceeding that accords the seaman various procedural and substantive rights, an order suspending or revoking the seaman's document or license may be entered by an administrative law judge. As noted supra, a seaman may seek a temporary document or license to permit his continued service while an appeal to the Vice Commandant from the law judge's order is pursued. Since the Coast Guard's only legal basis for suspending or revoking the seaman's document or license is the charge proved on the administrative record after notice and hearing and compliance with all other due process requirements, the decision to grant or deny a temporary document or license must be based on a predictive judgment concerning that charge alone. Clearly, that is not what occurred here. Rather, the Vice Commandant has denied appellant a temporary license on the ground of mental incompetence in a proceeding that only charged him with negligence on a specific occasion. This was prejudicial error, for the denial constituted a circumvention of the notice and hearing process that deprived appellant of the right to answer and defend against a charge not previously at issue.³

³The Coast Guard is, of course, free to initiate another proceeding against the appellant on a charge of incompetence should it conclude that his mental state subsequent to the subject incident so warrants. In this connection we note that the Coast Guard has regulatory authority, "in a hearing in which the physical or mental condition of the [appellant] is in controversy," to order a seaman to undergo a medical examination.

Even if the Vice Commandant's decision had not been predicated on an issue outside the scope of the instant proceeding, we would, nevertheless, find it unsustainable. This is so because his apparent judgment that appellant's "emotional condition" cannot be deemed compatible with his continued service at sea during the pendency of his appeal is not only unsupported by any medical evidence in the record, it is contradicted by the only medical evidence before the Vice Commandant.

The record establishes that in the aftermath of the death of appellant's co-worker, he voluntarily subjected himself to psychotherapy in an effort to come to terms with the systems of depression his "grief, remorse and sadness" had produced.⁴ After some 17 individual sessions, his psychotherapist essentially reported that but for a remaining problem with appellant's low self-esteem, brought on by "his overly-critical attitudes about himself and the exceedingly high expectations he has of himself" (see Exh. KK), he had progressed satisfactorily and would likely have a full recovery. The psychotherapist gave the opinion that appellant "in his present state of mind" is "fully competent to work" (*id.*)⁵ The Vice Commandant, without any other evidence before him, concluded that this report justified the denial of appellant's request for a temporary license. We think it self-evident that it does not.

In the opinion of the only therapist who has examined him, appellant has no debility which would preclude him from returning to work, notwithstanding an ongoing, and understandable, problem

See 46 CFR §5.557(a).

⁴See Exhibit KK. The "depressive symptoms" inconcluded depressed mood, difficulty concentrating, poor sleep, emotional lability (mood swings), irritability, and unfocused anger.

⁵Three witnesses, two of whom had closely worked with appellant both before and after the subject incident, and all of whom were or had been direct supervisors of appellant, with knowledge of the facts and circumstances of the incident and of the law judge's finding of negligence, testified without equivocation as to their unqualified confidence in appellant's ability as a chief engineer, describing him variously as "top drawer," "super deluxe," "my first choice," "outstanding" and "excellent." No contrary evidence was advanced by the Coast Guard at the hearing the law judge convened to take evidence of factors in aggravation or mitigation of any sanction that might be imposed on the charge of negligence he had sustained.

with self-confidence. Given this showing the Vice Commandant's speculative determination to the effect that appellant should not be deemed mentally fit enough to serve under a temporary license must be viewed as arbitrary. The therapist gave no indication of a "potential for recurring problems" as referenced by the Vice Commandant, and the Vice Commandant's assessment that the therapist's opinion that appellant is competent to work should be discounted, because he did not expressly state that appellant is qualified to work under the authority of his license illogically suggests that the therapist, notwithstanding his numerous sessions with appellant, was nevertheless unmindful of the nature of appellant's employment at the time of the incident that produced both his depression and this proceeding. In context, we think the therapist clearly was evincing his judgment that there was no psychological reason why appellant should not be allowed to resume the duties he performed at the time of the event which led him to seek out the therapist's services.

In sum, because the Vice Commandant's denial of appellant's request for a temporary license is based on a factor extraneous to the single charge upheld against him in this proceeding, it cannot be sustained.

ACCORDINGLY, IT IS ORDERED THAT;

1. The appellant's appeal is granted, and
2. The proceeding is remanded to the Vice Commandant for the prompt issuance of a temporary license to appellant during the pendency of his appeal from the law judge's decision and order.

KOLSTAD, Acting Chairman, LAUBER, NALL and DICKINSON, Members of the Board, concurred in the above opinion and order. BURNETT, Member of the Board, filed a concurring and dissenting statement.

CONCURRING AND DISSENTING STATEMENT

I join with the Board in granting the appeal and remanding to the Vice Commandant for the issuance of a temporary license during the pendency of the appeal. However, I disagree with the majority as to the basis for the decision. Under the applicable Coast Guard regulations the remedy being sought by appellant is the grant of a temporary license. This is not, as the majority seems to assume, the same thing as the stay of a judgment pending appeal. If the Coast Guard had so intended, they would have used that language. The applicable regulation, 46 CFR, Section 5.707(c) in fact, does not restrict the Coast Guard to consideration of the charge pending against the licensee alone, but provides "a determination as to the request will take into consideration whether service of the individual is compatible with the requirements for safety at sea and consistent with applicable laws." Therefore, I believe that the Board's holding that "the decision to grant or deny a temporary document or license must be based on a predictive judgment concerning that charge alone" to be in error and without support in the regulation or case precedent. Although under the Coast Guard regulations the agency is entitled to consider all safety related issued in deciding whether to issue a temporary license, if this decision is made in a judicial context, as in the case before us, it must be made on the basis of the adjudicated record. The record on appeal does not support the Vice Commandant's finding of mental incompetence of the appellant. The decision of the Vice Commandant should therefore be reversed.

Jim Burnett, Member
December 20, 1988